IN THE COURT OF COMMON PLEAS OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

JONATHAN A. PARISAN,)
Defendant-Below Appellant,	\}
v.) Case No.: CPU4-11-004298
JENNIFER K. COHAN,	
DIRECTOR, DELAWARE DIVISION OF MOTOR VEHICLES,)
Plaintiff-Below)
Appellee.)

Submitted: December 28, 2011 Decided: February 29, 2012

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DECISION ON APPEAL OF ADMINISTRATIVE OFFICER'S NOTICE OF REVOCATION

Jonathan A. Parisan, Defendant-Below/Appellant (hereinafter "Parisan") brings this appeal from a decision of the Department of Motor Vehicles (hereinafter "DMV") dated June 21, 2011, revoking his license pursuant to 21 Del. C. § 2742(b)(1).

The Administrative Hearing Officer found in his report that the Defendant violated both 21 Del. C. § 2742(b)(1) and 21 Del. C. § 2742(c)(1). In order to find the Defendant in violation of § 2742(b)(1), the State must establish by a preponderance of the evidence that the arresting officer had probable cause to arrest the Defendant for violation of 21 Del. C. § 4177, and that the Defendant refused to submit to chemical testing. In order to find the Defendant in violation of § 2742(c)(1), the State must only establish by a preponderance of the evidence that the arresting officer had probable cause to arrest the Defendant for violation of 21 Del. C. § 4177. At the administrative hearing in this case, the Defendant stipulated on the record that he refused to submit to chemical testing. Therefore, the Court will treat this appeal as an appeal of the Administrative Hearing Officer's finding that the State met its burden to establish that Defendant

The hearing officer concluded that there was probable cause to believe that Parisan drove a vehicle in violation of 21 Del. C. § 4177. The hearing officer further concluded that Parisan refused to submit to all field tests and chemical test after being informed of the penalty of revocation for such refusal, pursuant to 21 Del. C. § 2742(B).

On July 12, 2011, Appellant filed Notice of Appeal from the administrative action revoking his driving privileges with this Court. On November 16, 2011, Appellant filed an opening brief; on December 13, 2011, Appellee filed an answering brief; and on December 28, 2011, Appellant filed a reply brief.

FACTS AND PROCEDURAL HISTORY

Sergeant Andrew Rubin (hereinafter "Rubin") of the Newark Police Department testified that on September 11, 2010 at approximately 11:49 p.m., he was participating in a DUI check point, standing in a parking lot located at 69 East Main Street, Newark, Delaware. This is was located approximately 40-50 feet away from Newark Parking Authority Lot Number 1, at 54 East Delaware Avenue. Rubin testified he could not see the exit of Lot Number 1 from his position at 69 East Main Street. While observing the exit of Lot Number 1, Rubin saw a vehicle pulling out of the parking lot. As that vehicle exited through a lifted parking gate, Rubin observed a second silver vehicle pull forward closely behind the first vehicle. The second vehicle exited before the gate could close and without paying the required parking fee.

Rubin testified, as this silver vehicle was exiting the parking lot, he asked another officer to stop the vehicle.² Moments after the vehicle was stopped, Rubin made contact

² The officer that initially made the stop did not testify at the administrative hearing.

violated 21 Del. C. § 2742(b)(1) by a preponderance of the evidence, because in so stipulating, the Defendant effectively waived the right to challenge whether he in fact refused to chemical testing.

with the driver of the silver vehicle. Rubin asked the driver why he did not pay the parking fee, to which the driver simply replied that the gate went up. Rubin testified that, at the time of the stop, he had never seen the driver before, and there was one other person in the vehicle. The driver provided Rubin with his driver's license, which identified the driver as Parisan.

Rubin testified that while he was speaking with Parisan, he observed that his eyes were glassy and he slurred some of his words together. He testified that he detected a strong odor of alcoholic beverage coming from inside the vehicle. However, when asked, Parisan denied consuming any alcoholic beverage. Rubin further testified that Parisan removed his driver's license from his wallet in a slow, deliberate manner.

Rubin next testified that during the initial stop, Parisan's vehicle was blocking the exit to the parking lot and traffic began to back up. Rubin asked Parisan to move the vehicle out of the exit lane and onto Delaware Avenue. During cross-examination, Rubin admitted that after he observed Parisan's vehicle exit the parking lot without paying, Rubin did not see Parisan commit any additional traffic violations, nor observe any erratic driving. Additionally, during cross-examination, Rubin testified that he would not have allowed Parisan to personally move his vehicle from the exit lane and onto Delaware Avenue if he believed Parisan posed a danger to himself, his passenger, or other motorists at the time.

After Parisan moved the vehicle, Rubin asked him out of the vehicle for further testing because he suspected Parisan might be impaired. Rubin testified he began the field sobriety tests with the Horizontal Gaze Nystagmus ("HGN") test and gave instructions. However, immediately following the instructions, Parisan stated: "I refuse all tests." Parisan was then taken into custody and placed in the rear of the police vehicle. On cross

examination, Rubin admitted that during the traffic stop, Parisan did not stumble, stagger, sway, lose his balance, or have difficulty walking.

On June 17, 2011, Parisan appeared at the DMV Administrative Hearing pursuant to 21 Del. C. § 2742. On June 27, 2011, the hearing officer issued an opinion revoking Parisan's driver's license for twelve months pursuant to 21 Del. C. § 2742(b) finding that there was probable cause to believe Parisan was in violation of 21 Del. C. § 4177 and that Parisan refuse the chemical test.

The hearing officer based his probable cause finding on the following facts: (1)
Parisan was observed driving a vehicle and failed to pay the parking fee³; (2) there was a
strong odor of an alcoholic beverage from within the vehicle; (3) Parisan's eyes were glassy;
(4) Parisan removed his license from his wallet in a slow and very deliberate manner; (5)
Parisan refused all field sobriety testing.

STANDARD OF REVIEW

The decision of the Division of Motor Vehicles is reviewable by this Court on the record pursuant to 21 Del. C. § 2744.⁴ "The scope of review from an administrative decision of the Division of Motor Vehicles is limited to correcting errors of law and determining whether substantial evidence in the record exists to support the findings of fact and conclusions of law." Findings of the hearing officer will not be overturned by this Court on appeal as long as they are "sufficiently supported by the record and is the product of an orderly and logical deductive process." Substantial evidence means such "relevant

³ In violation of Newark, Del. C. § 20-120.

⁴ Ct. Com. Pl. Civ. R. 72.1(a) and 72.1(g); Shahan v. Landing, 643 A.2d 1357, 1359 (Del. 1994).

⁵ Eskridge v. Voshell, 593 A.2d, 589 (Del. 1991) (citations omitted).

⁶ Id. (quoting Levitt v. Bouvier, 287 A.2d 671, 673 (Del. 1972)).

evidence as a reasonable mind might accept as adequate to support a conclusion." If substantial evidence exists in the record below, this Court "may not re-weigh and substitute its own judgment for that of the Division of Motor Vehicle."8 However, "when the facts have been established, the hearing officer's evaluation of their legal significance may be scrutinized upon appeal."9 Nonetheless, "the Division's understanding of what transpired is entitled to deference, since the hearing officer is in the best position to evaluate the credibility of witnesses and the probative value of real evidence."10

DISCUSSION

The sole and dispositive issue on appeal is whether the DMV Hearing Officer erred as a matter of law in ruling that Officer Rubin had probable cause to believe that Parisan was in violation of 21 Del. C. § 4177.11 At the administrative hearing, in order to find the Defendant violated § 2742(b)(1), the State had the burden to prove by a preponderance of the evidence that the arresting officer had probable cause to conclude the Defendant was operating a vehicle while impaired, and that the Defendant refused to submit to chemical On appeal, this Court must determine whether substantial evidence exists to support the administrative hearing officer's findings of fact and conclusion of law that there was probable cause that Parisan was operating a vehicle in violation of 21 Del. C. § 4177(a).

To establish probable cause, the totality of the facts and circumstances within the officer's knowledge at the time of the arrest must be sufficient to warrant a person of

¹ Howard v. Voshell, 621 A.2d 804, 806 (Del. 1992)(citing Quaker Hill Place v. State Human Relations, 498 A.2d 175 (Del. 19850; 21 Del. C. § 2742(c)).

⁸ Wayne v. Div. of Motor Vehicles, 2004 WL 326926, at *1 (Del. Com. Pl. Jan. 22, 2004) (citing Barnett v. Div. of Motor Vehicles, 514 A.2d 1145 (Del. Super. 1986); Janaman v. New Castle County Board of Adjustment, 364 A.2d 1241, 1242 (Del. Super. 1976)).

9 Voshell v. Addix, 574 A.2d 264, *2 (Del. 1990) (TABLE).

¹¹ Parisan does not dispute that he refused all testing after being stopped by Officer Rubin.

reasonable caution to believe that criminal activity has been or is presently being committed.¹² "Probable cause is an elusive concept which avoids precise definition . . . It lies somewhere between suspicion and sufficient evidence to convict."¹³ The possibility of hypothetically innocent explanations for each of the facts revealed during the investigation does not preclude a finding of probable cause.¹⁴ To establish probable cause is to believe that a defendant was operating a vehicle under the influence of alcohol is determined by the totality of the circumstances as viewed by a reasonable officer in light of his or her training and experience.¹⁵ Further, it only requires the police to present facts suggesting, in the totality of circumstances, that a fair probability exists that the defendant has committed a crime.

The provisions of 21 Del. C. § 4177(a)(1) provide that: "[n]o person shall drive a vehicle . . . [w]hen the person is under the influence of alcohol." "Under the influence" means that "the person is, because of alcohol or drugs or a combination of both, less able than the person would ordinarily have been, either mentally or physically, to exercise clear judgment, sufficient physical control, or due care in the driving of a vehicle." Probable cause to arrest for DUI is frequently based on the observations of the arresting officer, and commonly includes an evaluation of the driver's performance on field sobriety tests. ¹⁷

Parisan argues that the hearing officer erred in finding probable cause that he was operating a vehicle under the influence of alcohol at the time of his arrest on September 11, 2010. Specifically, Parisan points to evidence of his normal behavior during periods of the stop. Additionally, Parisan claims that avoiding a toll, slurring some of his words, glassy

¹² Lefebvre v. State, 19 A.3d 287, 293 (Del. 2011) (citing State v. Maxwell, 624 A.2d 926, 928 (Del. 1993)).

¹³ Maxwell, 624 A.2d at 929 (citations omitted).

¹⁴ Id. At 930.

¹⁵ Miller v. State, 4 A.3d 371 (Del. 2010)

¹⁶ Lefebvre, 19 A.3d at 292 (citing 21 Del. C. § 4177(c)(5)).

eyes, the strong odor of alcohol coming from his vehicle, and refusing all tests, fails to provide the foundation necessary for a probable cause determination by the hearing officer.

In Church v. State, the Delaware Supreme Court found that probable cause existed to believe that a defendant was driving under the influence of alcohol based on: a single vehicle accident; the defendant's unstable appearance; a strong odor of alcohol emanating from the defendant's breath; defendant had watery, glassy and bloodshot eyes; and the defendant's refusal to submit to field sobriety and blood tests. The Delaware Supreme Court explained that a "defendant's refusal to submit to testing may be used for any relevant purpose, including to show consciousness of guilt." This case is similar to Church because: Parisan did not pay a required parking toll; there was a strong odor of alcohol coming from the vehicle that Parisan was driving; Parisan had glassy eyes; and Parisan refused all tests.

In *Higgins v. Shahan*, the Delaware Superior Court found there was probable cause to believe that the defendant had violated 21 Del. C. § 4177 where, the defendant was involved in a traffic accident; had bloodshot and glassy eyes; an odor of alcohol emanated from the defendant; the defendant's admission to consuming alcoholic beverages; and the defendant's refusal to perform field tests.²¹ The facts in these proceedings which were relied upon by the hearing officer are very similar to those present in *Higgins*, namely; the defendant's refusal to perform field tests; a traffic violation; glassy eyes; and an odor of alcohol.

Additionally, in *State v. Breza*, this Court found that probable cause existed to believe that the defendant had violated 21 Del. C. § 4177 based on: the defendant's failure to come to a complete stop at a stop sign; yelling and use of profanity throughout the traffic stop; an odor of alcoholic beverages emanating from the vehicle and from defendant's person after

¹⁸ Church v. State, 11 A.3d 226, *2 (Del. 2010 (TABLE).

¹⁹ Id.

²⁰ See *supra* note 3.

²¹ Higgins v. Shahan, 1995 WL 108699, at *3 (Del. Super. Jan. 18, 1995)

she exited the vehicle; defendant's trouble completing sentences, conflicting statements, and avoidance of police officer questions.²² This case is similar to *Breza* because Parisan committed a traffic violation; there was a strong odor of alcohol coming from the vehicle that Parisan was driving; and Parisan slurred some of his words. Unlike *Breza*, Parisan did not harass the arresting officer and complied fully with all of the officer's instructions for the duration of the traffic stop. Also, unlike *Breza*, Parisan categorically refused all sobriety tests.

The facts presented at the Administrative Hearing which included a traffic violation, strong odor of alcoholic beverage, slurred speech, glassy eyes and slow deliberate actions is sufficient for the Hearing Officer to conclude there was probable cause. Therefore, based upon the record and the analysis herein, I find that the hearing officer's determination of probable cause is sufficient supported and is the product of an orderly and logical deductive process. Accordingly, the decision is AFFIRMED.

IT IS SO ORDERED

Alex J. Smalls Chief Judge

cc:

Hearing Officer

Division of Motor Vehicles

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²² State v. Breza, 2011 WL 6946980, at *5 (Del.Com.Pl. Dec. 20, 2011).